upa

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3691 OF 2003
IN
SUIT NO.611 OF 1979

Dhirajlal N. Mistry)..Plaintiff

Versus

Chandrakant N. Mistry and others)..Defendants

Mr.V.R. Walavalkar with Ms.Deepti Adhav i/b.M/s. Gordhandas & Forzdar for the Plaintiff.

Mr.D.H. Mehta with Ms.Priti Gada i/b.Sudhir M. Shah for Defendant No.1.

Mr.N.V. Vimadalal for Defendant Nos.2 and 3.

CORAM : SMT. NISHITA MHATRE, J.

DATED : 5TH MAY 2006

P.C.:

. The present Motion has been taken out for passing a final decree in respect of partition of the business of M/s.Triumph Engineering Works (hereinafter referred to as the "suit business") together with its goodwill, tenancy rights and assets. The Plaintiff claims that he and each of the Defendants are entitled 1/4th share of the suit business.

2. The Plaintiff and Defendants are the sons of one Narsi Raysey Mistry (hereinafter referred to as

"Narsi"), who died on 5th July 1978. The present Suit has been filed for administration of the estate of Narsi. Suit No.1152 of 1980 has been filed for administration of the estate of the mother of the Plaintiff and the Defendants Rambaben Narsi Mistry, who died on 29th April 1976. By a common judgment and order dated 23rd July 2003, a learned Single Judge of this Court (J.A. Patil, J.) has passed a preliminary decree of partition. The rights and shares of the parties to the suits have been declared. It is also been found by this Court that the business of the suit business was that of Narsi. The operative portion of the preliminary decree passed by the learned Single Judge reads as follows :-

(i) Suit No.611/79 filed by Dhirajlal and Suit No.1152 of 1980 filed by Nitin and Vinod are partly decreed.

(ii) It is hereby declared that the business of M/s.Triump Engineering Works is a joint family business of the parties and that the four sons viz. Dhirajlal, Chandrakant, Nitin and Vinod each has a 1/4th share in the said business.

(iii) It is further declared that each of Dhirajlal, Nitin and Vinod is entitled to get accounts from Chandrakant in respect of the business of M/s.Triump Engineering Works for a period commencing from three years prior to the filing of their respective suits. "... A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result

of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is finaly. Both the decrees are in the same suit. Final decree may be said to become final in two ways : (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest Court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word 'decree' is used in Section 2(2) of CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree."

(iv) The accounts shall be taken by a commissioner to be appointed by this Court.

(v) If upon taking accounts, any amount is found to be payable to Dhirajlal, Nitin and Vinod the same shall be paid to them by Chandrakant on their paying the requisite court fee.

(vi) The claim for partition of the rest of the suit properties is dismissed.

(vii) The declaratory reliefs claimed by Nitin and Vinod in respect of the Will of Narsi Raisi Mistry dated 14th March 1978 is however refused.

(viii) Chandrakant (Defendant No.1 in both the suits) is permanently restrained from disposing of, enumbering or parting with possession/control of the business of M/s.Triump Engineering Works.

(ix) Preliminary Decrees be drawn accordingly.

(x) Suit No.611/1979 and Suit No.1152 of 1980 are accordingly disposed of in the abovementioned terms. In the circumstances of the case all parties

shall bear their respective costs."

3. Defendant No.1 claims that Narsi had left behind a Will under which he was entitled to the assets of Narsi including the suit business. The Probate Petition which was filed was dismissed for want of prosecution. According to the Plaintiff and Defendant Nos.2 and 3 who are supporting the Plaintiff, Defendant No.1 is not entitled to continue in possession of and enjoy the estate of the deceased Narsi solely for his own benefit. The Plaintiff has, therefore, prayed for a final decree being passed in the Suit. For the purpose of partitioning the suit business, the Plaintiff has sought appointment of the Commissioner to take accounts and for a direction to distribute the net sale proceeds of the suit business between the Plaintiff and the Defendants in equal shares.

4. After the judgment and order was passed granting the preliminary decree wherein the shares had been declared, Defendant Nos.2 and 3 moved an application before the learned Judge for amendment of the decree. This application was made on a preacipe and, therefore, the learned Judge directed them to take out appropriate proceedings for amendment of the decree. This order was passed on 19th December 2003. A Chamber Summons was then filed by Defendant Nos.2 and Defendant No.3 being

Chamber Summons No.268 of 2004 before this Court. That Chamber Summons has been disposed of as Defendant Nos.2 and 3 sought permission to withdraw the same. However, the learned Judge on 16th April 2005 while permitting the withdrawal clarified that the interpretation of the order dated 23rd July 2003 (preliminary decree) would be a matter of determination in the proceedings pending before the Small Causes Court. All the contentions of the parties before that Court were kept open.

5. The Plaintiff contends that the landlord of the premises in which the suit business is being run has filed RAE Suit No.846/1692 of 1996 seeking possession of Shop Nos.1, 2, 3 and Godown No.5 from Defendant No.1. An application was made by the Plaintiff and Defendant Nos.2 and 3 for being joined as Defendants to the Suit. This application has been granted despite the opposition of Defendant No.1. The Plaintiff contends that by the preliminary decree it has been held that the tenancy rights cannot be partitioned, but all the four brothers had a right of joint or common enjoyment of the premises. It is for this reason the Plaintiff claims that the premises be sold along with the suit business and the sale proceeds distributed between the parties under Section 2 of the Partition Act, 1893.

6. The learned Counsel appearing for Defendant No.1 vehemently opposes this application. He contends that the Defendant Nos.2 and 3 having failed in their attempt to get the operative portion of the preliminary decree modified, it was not open for the Plaintif to seek the same reliefs in the present Motion. He further contends that the Chamber Summons taken out by Defendant Nos.1 and 2 for the same purpose has been withdrawn and, therefore, no reliefs can be granted in the present Motion. According to the learned Counsel, if at all the Plaintiff is entitled to any relief, it would be in the Suit filed before the Small Causes Court and not the present Suit. He further urges that there is no order directing sale of the suit business and therefore, the reliefs in the Motion cannot be granted.

7. As stated earlier, Defendant Nos.2 and 3 have supported the claim made by the Plaintiff in the Motion.

8. In the case of *Shankar Balwant Lokhande* vs. *Chandrakant Shankar Lokhande and another*, **(1995) 3 SCC 413**, the Apex Court has observed thus :-

> ".... A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is finaly. Both the decrees are in the

> same suit. Final decree may be said to become final in two ways : (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest Court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word 'decree' is used in Section 2(2) of CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree."

9. In *Mool Chand and others* vs. *Dy. Director, Consolidation and others*, **(1995) 5 SCC 631**, the Apex Court has again commented upon proceedings in which a preliminary decree has been passed. The Apex Court has observed that once a preliminary decree is passed, the proceedings so far as the declaration of the rights or rights in the land or property come to an end. Those rights are to be worked out by a final decree.

10. By relying on these judgment, the learned Counsel for the Plaintiff points out that in furtherance of the preliminary decree passed on 23rd July 2003, the reliefs claimed in the Motion must be granted.

11. There can be no dispute that in view of the judgment of the Full Bench of this Court in *Tangerine Electronics Systemts Pvt. Ltd.* vs. *Indian Chemicals and others*, **2004 (5) BCR 673**, by operation of law tenanted premises can be attached or sold. The Court

has observed that the interest of the tenant of non-residential premises to which the Maharashtra Rent Control Act, 1999 applies, is attachable and saleable in execution of the decree against the tenant. In the present case, the rights and shares of the parties have already been deterined by the preliminary decree . It is only in furtherance of that decree that reliefs have been sought in the Motion.

12. In my view, therefore, Notice of Motion must be allowed in terms of prayer clauses (a) to (e). No order as to costs.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3691 OF 2003
IN
SUIT NO.611 OF 1979

Dhirajlal N. Mistry)..Plaintiff

Versus

Chandrakant N. Mistry and others)..Defendants

Ms.Deepal J. Thakar i/b.Gordhandas & Fozdar for Plaintiff.

Ms.Jalpa Trivedi i/b.Sudhir M. Shah for Defendant No.1.

Ms.Mrudula Kadam i/b.N.V. Vimadalal for Defendant Nos.2 and 3.

CORAM : SMT. NISHITA MHATRE, J.

DATED : 5TH MAY 2006

P.C.:

. An application is made at 3.00 p.m. in Chambers on behalf of Defendant No.1 for stay of the Order which

was pronounced in the morning at 11.00 a.m.

2. Operation of the order is stayed for eight weeks from today.